

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-4-08

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY)	
EMPLOYEES ASSOCIATION,)	
)	
Complainant,)	FINDINGS AND ORDER ON
)	RESPONDENT'S PETITION
v.)	FOR ATTORNEY FEES ON
)	APPEAL
CLACKAMAS COUNTY,)	
)	
Respondent.)	
_____)	

On March 26, 2008, this Board issued an Order dismissing the complaint because it failed to state a claim for relief. 22 PECBR 404. Clackamas County Employees Association (Association) appealed. The Court of Appeals affirmed this Board's Order without opinion and the Supreme Court denied review. 228 Or App 368, *rev den* 347 Or 258 (2009).

On June 2, 2009,¹ Clackamas County (County) petitioned for attorney fees as the

¹Under Board rules, a petition for attorney fees on appeal must be filed within 21 days of the appellate judgment. The County filed this petition after the Court of Appeals issued its decision, but before it issued an appellate judgment. We will not dismiss a petition for attorney fees as premature so long as the opposing party suffers no prejudice and the other provisions of the rule are met. *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01, 21 PECBR 186, 187 n 2 (2005) (Attorney Fees Order). The Association claims no prejudice and the petition is otherwise sufficient. On this record, we consider the filing timely.

party that prevailed on appeal.² On June 16, 2009, the Association objected to the petition. One of the Association's objections is that ORS 243.676, by its plain terms, authorizes an award of attorney fees on appeal only against a party that has committed an unfair labor practice. The Association argues that it did not commit an unfair labor practice and therefore cannot be liable under the statute for the County's attorney fees. The County argues that the statute is not so restrictive and authorizes attorney fees to any party that prevails on appeal. For the reasons stated below, we agree with the Association and will dismiss this petition.

The petition and objections raise an issue of statutory construction. To construe a statute, we apply the analytical framework established in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Our goal is to determine the intent of the legislature. To do so, we first examine the text and context of the statute along with any relevant legislative history offered by the parties, giving the history the weight we believe it merits. *Gaines*, 346 Or at 171-172. If the legislature's intent remains unclear after examining the statute's text, context, and legislative history, we apply general maxims of statutory construction. *PGE*, 317 Or at 612.

We begin by analyzing the text and context of ORS 243.676. It states in pertinent part:

"(2) Where * * * the board finds that any person named in the complaint has engaged in or is engaging in any unfair labor practice charged in the complaint, the board shall:

" * * *

"(d) Designate the amount and award representation costs, if any, to the prevailing party; and

"(e) Designate the amount and award attorney fees, if any, to the prevailing party on appeal, including proceedings for Supreme Court review, of a board order.

²The County called its filing a "Petition For Representation Costs." It does not, however, seek reimbursement for work performed before this Board. Instead, it seeks reimbursement solely for work performed before the Court of Appeals. *See Eugene Police Employees Association v. City of Eugene*, Case No. UP-43-97 (Unpublished Attorney Fees Order, August 1999) (treating a document labeled "petition for representation costs" as a petition for attorney fees on appeal).

“(3) Where the board finds that the person named in the complaint has not engaged in or is not engaging in an unfair labor practice, the board shall:

“(a) Issue an order dismissing the complaint; and

“(b) Designate the amount and award representation costs, if any, to the prevailing party.”

The legislature structured the statute so that different sections apply, depending on whether or not a party committed an unfair labor practice. Section (2) applies when a party has committed an unfair labor practice. Section (3) applies here because we concluded that the County did not commit an unfair labor practice. Under section (3), this Board is authorized to designate and award “representation costs” to the County. The statute does not define representation costs. Based on the text alone, we cannot determine whether the phrase “representation costs” includes attorney fees on appeal.

The context, however, provides a crucial clue. Context includes other provisions of the same statute. *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997). Under section (2) of the statute, when a party commits an unfair labor practice, we can designate and award not only “representation costs,” but also “attorney fees, if any, to the party prevailing on appeal * * *.” In other words, the legislature authorizes *both* representation costs *and* attorney fees on appeal when a party commits an unfair labor practice, but it authorizes only representation costs when no party commits an unfair labor practice.

When the legislature uses different terms in a statute, we infer it intended those terms to have different meanings. *State v. Guzek*, 322 Or 245, 265, 906 P2d 272 (1995). We thus conclude that the legislature intended “representation costs” to mean something different from attorney fees for prevailing on appeal. In section (2), the legislature authorized an award of attorney fees on appeal. It chose not to include that same authority in section (3), the provision that controls here. We may not insert a provision for attorney fees on appeal where the legislature has chosen not to include one. ORS 174.010 (in construing a statute, we may not “insert what has been omitted or omit what has been inserted.”).

The County argues that “representation costs” include attorney fees on appeal. We disagree. As discussed above, section (2) separately authorizes us to award both representation costs and attorney fees on appeal. The County’s definition would make section (2)’s provision for attorney fees on appeal unnecessary and redundant because, according to the County, such fees are already authorized as “representation costs.” We

should avoid construing a statute in a way that makes any provision meaningless. ORS 174.010; *EQC v. City of Coos Bay*, 171 Or App 106, 110, 14 P3d 649 (2000). Construing “representation costs” to exclude attorney fees on appeal gives meaning to all provisions of the statute. The County’s definition would not, and we reject it for that reason.³

We also look to this Board’s decisions on the issue. Although not cited or discussed by the parties, the issue has come up several times, with inconsistent results.

In *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, Case No. UP-143-85, 11 PECBR 259 (1989), this Board found no unfair labor practice and accordingly dismissed the complaint. The Supreme Court reversed and the complainant then sought attorney fees as the prevailing party on appeal. We denied fees. The Board rule in effect at the time provided that

“[t]he petitioning party must have been a prevailing complainant in an unfair labor practice case and the order of the Board must have been affirmed by the Court of Appeals or, where applicable, by the Supreme Court.” OAR 115-35-057(2) (1987).

We explained the rationale for the restrictive nature of the administrative rule: the statute that authorizes attorney fees on appeal appears only in the section of the statute concerning remedies available when we find that a party committed an unfair labor practice. It does not appear in the section regarding remedies when we find that a party did *not* commit an unfair labor practice. The Board said that in adopting the rule, “[w]e ascribed some significance” to the statutory structure. *Id.* at 260. We also said that there are reasonable arguments to the contrary, *i.e.*, that the purposes and policies of the Public Employee Collective Bargaining Act (PECBA) “would be advanced if awards were made to parties that prevail on appeal, regardless of their status as an appellant or respondent in the appellate proceedings.” *Id.* We expressed sympathy with that view, but said that we are required to follow our own rules until they are changed. We therefore dismissed the petition.

Coan and Goar v. City of Portland, Case No. UP-23/24/25/26-86 (Unpublished Attorney Fees Order, February 1989), involved the same circumstances as here. That is, the Board dismissed the complaint and the complainant appealed. The respondent successfully defended the Board’s order on appeal and sought attorney fees as the prevailing party on appeal. The Board recited the rationale nearly verbatim from the

³We do not consider legislative history because neither party provided any. *See* ORS 174.020(3) (“A court may limit its consideration of legislative history to the information the parties provide to the court.”).

Portland Fire Fighters case. We dismissed the petition because of the administrative rule, but again expressed sympathy for awarding attorney fees to any party that prevails on appeal.

Shortly after these decisions, in December 1989, we amended the administrative rule. The pertinent provisions of the amendment are still in place today.⁴ The rule now provides that “the Board shall designate the amount of and award attorney fees to the prevailing party on an appeal of a Board Order * * *.” OAR 115-035-0057. The rule defines a prevailing party as “the party designated as such in the appellate judgment issued by the Court of Appeals or the Supreme Court * * *.” *Id.* at section (2).

In *Oregon School Employees Association v. Rainier School District No. 13*, Case No. UP-85-85, 13 PECBR 105 (1991), we explained the rationale for the new rule. We said that after several years of experience with the original rule, we became convinced that the better position was to award attorney fees to all prevailing parties on appeal. We intended the current rule

“to provide all prevailing parties equal opportunities to be awarded attorney fees. We believe the rule now represents a more equitable application of the statutes and better serves to carry out the legislature’s purpose in adopting ORS 243.676(2)(e).” 13 PECBR at 106.

In *Rainier School District*, we applied the new rule. We determined that the respondent did not commit an unfair labor practice, and the respondent successfully defended the Board’s Order on appeal. We awarded the respondent attorney fees on appeal, even though no unfair labor practice was committed.

In similar circumstances, we subsequently awarded attorney fees to prevailing respondents in *Chenowith Education Association v. Chenowith School District 9*, Case No. UP-104-94, 17 PECBR 21(1996) (Attorney Fees Order); *Federation of Oregon Parole and Probation Officers v. State of Oregon Department of Corrections and Multnomah County*, Case No. UP-51-91 (Unpublished Attorney Fees Order, December 1995); and *Marion County and Marion County Sheriff v. Marion County Law Enforcement Association*, Case Nos. UP-100/110-93, 15 PECBR 195 (1994) (Attorney Fees Order). None of those later cases discusses the propriety of awarding attorney fees under the statute when there is no unfair labor practice, and they do not cite the *Rainier* case.

⁴The rule was subsequently amended to change some timelines, but those changes are not pertinent to the issue before us.

We find the interpretation of our administrative rule exemplified in these cases to be inconsistent with the language of the statute. As discussed above, the statute does not authorize an award of attorney fees when no unfair labor practice was committed. To the extent the cases hold to the contrary, we overrule them.⁵

Based on the text and context of ORS 243.676, we conclude that when this Board dismisses an unfair labor practice complaint and a respondent successfully defends the dismissal on appeal, the statute does not authorize an award of attorney fees on appeal. Accordingly, we will dismiss the County's petition.

ORDER

The County's petition is dismissed.

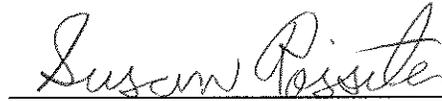
DATED this 9 day of June 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

⁵We address only the narrow circumstance presented here: this Board dismissed an unfair labor practice complaint and the court affirmed on appeal. We need not decide, and thus do not address, other appeal scenarios where the Board, at least initially, dismisses an unfair labor practice complaint. For example, this Board has awarded attorney fees on appeal to a complainant where the Board dismissed an unfair labor practice complaint but the court reversed, finding that an unfair labor practice occurred. *Portland Fire Fighters' Association, Local 43 v. City of Portland*, Case No. UP-58-99 (Unpublished Attorney Fees Order, October 2002). Similarly, we awarded attorney fees on appeal to a complainant where the Board initially dismissed the unfair labor practice complaint, the court remanded, and on remand, we concluded there was an unfair labor practice. *Deschutes County Sheriff's Association v. Deschutes County and Deschutes County Sheriff's Office*, Case No. UP-55-97 (Unpublished Attorney Fees Order, August 2001). We express no opinion on the continuing validity of those cases.